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In The

Supreme Court of the United States

October Term, 1990

JIM MATTOX, ATTORNEY GENERAL OF TEXAS,

Petitioner,

v.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE STATES OF ALABAMA, HAWAII, INDIANA, MISSISSIPPI, NEW JERSEY, PENNSYLVANIA, UTAH AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37 of the Rules of this Court, the States of Alabama, Hawaii, Indiana, Mississippi, New Jersey, Pennsylvania, Utah and Virginia as amici curiae, respectfully submit this brief in support of the petitions for writ of certiorari submitted by the State of Texas in No. 90-221, and the State of California and 32 other states (hereinafter, "thirty-three states") in No. 90-232, both seeking review of the decision of the United States Court

of Appeals for the Fifth Circuit issued April 3, 1990, and reported at 897 F.2d 773, affirming the order of the United States District Court for the Western District of Texas, granting a preliminary injunction to respondents. The decision of the District Court is reported at 712 F.Supp. 99. The decision of the Circuit Court merits review and reversal by the Court, since there is a split in the Circuit Courts of Appeals on the preemption question raised by these petitions[1] and since the thirty-three states' due process rights have been violated.

INTEREST OF THE AMICI CURIAE

The amici are some of sixteen states not subject to the injunction appealed from in these petitions.

Pursuant to the police power, each of the amici States have enacted laws to prevent unfair and deceptive acts and practices.[2] These statutes have been broadly applied to protect not only the consumers of goods and services residing in the amici States, but also to others within those States, including the many travellers who, upon

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[1] The Circuit split is annotated in the thirty-three states' petition in No. 90-232 at ii. We note that the Ninth Circuit very recently interpreted the preemptive effect of 49 U.S.C.App. § 1305(a)(1) inconsistently with the interpretation given that statute by the Fifth Circuit in this action. *West v. Northwest Airlines, Inc.*, 1990 WestLaw 128847, 1990 U.S. App. LEXIS 15793 (9th Cir. Sept. 11, 1990).

[2] *E.g.*, Ala. Code § 8-19-1, *et seq.* (1975); Haw. Rev. Stat. § 480-2, *et seq.*, (1985); Ind. Code § 24-5-0.5; Miss. Code Ann. § 75-24-1 *et seq.* (Supp. 1990); N.J. Stat. Ann. § 56:8-1, *et seq.*; Pa. Stat. Ann. Tit. 73, § 201-2, *et seq.* (Purdon Supp. 1990); Utah Code Ann. § 13-11-1, et seq. (1988); Va. Code §§ 59.1-196 to 207.

arrival in an amici State find that they have been victims of an unfair or deceptive act involving airline promotional activity.

The air travel industry plays a vital role in the economies of the amici States by providing transportation to travellers who will purchase goods and services in the States. The high cost of air transportation, relative to many consumer transactions, makes it an area that is ripe for abuse by the unscrupulous, and hence, the need for rigorous enforcement of State law guarding against unfair and deceptive acts and practices is great. Great, too, is the States' interest in assuring that consumers have access to advertising information that is not misleading in order that they may make informed decisions about their travel options.

The amici States have a substantial interest in preserving the historic assumption that the enforcement of consumer protection laws, as an aspect of state police powers, should not be superseded by a federal statute except by a clear and manifest expression by Congress.

These vital and substantial interests warrant the submission of this amici brief in support of petitioners' efforts to obtain review by this Court of the lower courts' decision to prevent thirty-four sovereign States from enforcing their unfair and deceptive practice statutes against false advertising by airlines.[3]

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[3] The fact that a permanent injunction has been filed in this case does not mean that this appeal is moot or is not ripe for decision. Although courts have dismissed appeals of preliminary injunctions after a permanent injunction has been

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SUMMARY OF ARGUMENT

Historically, the States have exercised the power to protect their citizens from unfair and deceptive business

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filed, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926); *Continental Training Services, Inc. v. Cavazos*, 893 F.2d 877, 880 (7th Cir. 1990); *United States v. Local 30, United Slate Tile & Composition Roofers*, 871 F.2d 401, 403 (3d Cir. 1989), the facts of this case are such that the issues presented by the appeal of the preliminary injunction can be decided at this time.

The permanent injunction filed in this case is almost identical to the preliminary injunction in its findings, reasoning, and conclusions. If this appeal was dismissed, and appellants were required to begin the appeal process anew with an appeal of the permanent injunction, then the Circuit Court would certainly reaffirm its earlier ruling in the case and the case would then be brought before this court in the same posture as it is now. Requiring appellants to appeal the same order again to the Circuit Court would be requiring appellants to go through a futile exercise that wastes the resources of this Court and the Circuit Court.

In the analogous situation of the requirement in administrative law that administrative remedies be exhausted prior to judicial review, the Court has created an exception so that futile actions by appellants are not required. For example, in discussing appeals of cases under the Education of the Handicapped Act, the Court stated:

> It is true that judicial review is not normally available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.
>
> *Honig v. Doe*, 484 U.S. 305, 326-7 (1988).

(Continued on following page)

practices through the police power. The Fifth Circuit Court of Appeals erroneously held that the federal regulatory scheme in the field of commercial air transportation preempts the States' right to protect their citizens. This construction of the applicable federal law, 49 U.S.C.App. § 1305, is incorrect.

The Fifth Circuit also erred in holding that there was personal jurisdiction over the thirty-three attorneys general who were made parties to this litigation against their will and without notice or an opportunity to be heard. This holding violates the due process rights of those thirty-three attorneys general, and ignores the substantive law of intervention.

(Continued from previous page)

This case is not similar to *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), where the Court held that the appeal was not ripe because administrative action was not complete. In that case the respondent argued that its property was taken by the local government as the result of a land use law, but the court held that because respondent failed to try to get zoning variances, no final decision had been made by the local government. In this case, however, the Circuit Court has considered all of appellants' claims, and there are no unresolved issues which need to be addressed by another court or agency.

ARGUMENT

I. IT IS A TRADITIONAL POWER OF THE STATES TO PASS AND ENFORCE LAWS TO PROTECT CONSUMERS FROM DECEPTIVE ADVERTISING PRACTICES AND THIS POWER HAS NOT BEEN PREEMPTED IN THE FIELD OF AIRLINE PROMOTIONAL ACTIVITY.

The Fifth Circuit Court of Appeals was wrong in finding that Congress has specifically preempted the States' traditional power to guard against fraudulent advertising in the field of air transportation. The protection of consumers from unfair and unlawful practices is an area traditionally regulated by the States pursuant to their police powers. *See, California v. ARC America Corp.*, 109 S.Ct. 1661 (1989); *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Automobile Importers of America v. Minnesota*, 871 F.2d 717 (8th Cir. 1989); and *Chrysler Corp. v. Texas Motor Vehicle Comm.*, 755 F.2d 1192, 1205 (5th Cir. 1985). The States generally guard against unfair and deceptive business practices through statutory provisions which proscribe these activities.

The courts below ignored the presumption against finding preemption of state law in areas traditionally regulated by the States. *California v. ARC America*, 109 S.Ct. at 1665. The Circuit Court construed the language "relating to routes, rates and services" contained in 49 U.S.C.App. § 1305(a)(1) as a talisman to preempt all state regulation relying on *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). However, the ERISA preemption upheld in *Shaw* based upon the words "relating to" in 29 U.S.C.

§ 1144(a) was premised upon a statutory scheme that is more broadly worded to evidence Congressional intent to preempt state regulation than the one before the Court here.

In the instant situation, Congress could easily have preempted all state regulation by stating that the federal law preempted all state laws "relating to air transportation". The specific language used by Congress, however, deals only with three areas: rates, routes and services. This is particularly significant. As this Court held in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), common law remedies for fraudulent misrepresentation were *not* preempted in the airline area. This holding predated the passage of 49 U.S.C.App. § 1305. If Congress had desired to specifically eliminate state law remedies, it could have done so, but did not.

The business of airlines and their agents is not to falsely advertise or fraudulently misrepresent their products. Deceptive advertising is not a "route, rate, or service" of the airlines. It is possible that false advertising would include a description of a rate, route, or service, and under the Fifth Circuit's interpretation, an airline or other business using such false advertising would, in effect, be immune from state unfair trade practices statutes. Such a finding would exempt the airlines, ticket agencies and other air transportation companies from complying with statutes adopted under traditional state police power protecting consumers.

The practical immediate effect of the Circuit Court's holding is that a business could avoid any type of state prosecution for fraudulent misrepresentation as long as

there was even the most tenuous relationship between the misrepresentation and airline rates, routes, or services. For example, a ticket agent could engage in "bait and switch" techniques, advertising a particular low price and then switching the price of the actual travel. Under the Fifth Circuit's interpretation, since the advertising mentions a rate, this consumer fraud could not be prosecuted under state law.

If state regulatory powers are preempted, the only penalty against an airline or related business engaged in false and deceptive advertising would be a cease and desist order issued by the Secretary of the United States Department of Transportation under 49 U.S.C.App. § 1381. State regulatory laws typically allow a much wider range of enforcement options, including treble and punitive damage actions to prevent deceptive practice activities. If Congress intended to so profoundly usurp traditional state police powers, surely a clearer expression of that intention would have been given than the one found in 49 U.S.C. § 1305(a)(1).

II. THE FINDING THAT THE TRIAL COURT HAD PERSONAL JURISDICTION OVER THE THIRTY-THREE STATES VIOLATES NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE, AND IGNORES THE PROCEDURE FOR INTERVENTION BY STATES SET OUT BY CONGRESS AND THE FEDERAL RULES OF CIVIL PROCEDURE.

The District Court made the attorneys general representing thirty-three states parties to litigation in the Western District of Texas without the requisite facts or law to support a finding of jurisdiction. The Court's finding of

personal jurisdiction over the thirty-three attorneys general violates traditional due process requirements,[4] and ignores federal statutory and rule law.

The Circuit Court recognizes that the thirty-three states did not appear as parties and had not made any motion to intervene in the case. *Trans World Airlines v. Mattox*, 897 F.2d 773, 786-7 (5th Cir. 1990). Forcing individual states to be parties to a lawsuit and applying an injunction to them after the injunction has issued denies these states the most fundamental due process rights: notice and an opportunity to be heard.

The decisions below ignore this Court's long held view that personal jurisdiction must not violate "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310 at 316 (1945). Most recently, this Court, in *Burnham v. Superior Court of California*, 58 L.W. 4629 (U.S., May 29, 1990) stated that jurisdiction caselaw makes a distinction between "novel, nontraditional assertions of jurisdiction," which are constitutionally suspect, and "traditional," and hence, constitutional grounds for jurisdiction. *Id.* at 4633. Surely the assertion of jurisdiction over the thirty-three states here is constitutionally suspect.

In its decision finding *de facto* jurisdiction, the Fifth Circuit cited *Cactus Pipe & Supply v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1989) to support the proposition that the thirty-three attorneys general had effectively waived the personal jurisdiction issue. *Trans World Airlines, Inc. v.*

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[4] Clearly, States are entitled to due process protections. *See, e.g, Block v. North Dakota*, 461 U.S. 273, 291 (1983).

Mattox, 897 F.2d at 786. However, *Cactus Pipe* indicates that personal jurisdiction may be found only if a party enters a case and if certain conditions are met. *Ibid.* at 1108. Those conditions include failing to object to jurisdiction and requesting that the court take some affirmative action "on its behalf in some substantive way." *Id.* The conditions were not met in the instant case.

First, none of the thirty-three states had entered the case and only Texas had been made a party to this action prior to the injunction motion. As the Circuit Court recognized, there was no question raised about jurisdiction as neither the airlines (respondents here) nor Texas had sought to include the thirty-three states in the litigation. As further recognized by the Circuit Court, the pleading filed by the thirty-three states included an expression that they were "specially appearing" before the court. *Trans World Airlines, Inc. v. Mattox*, 897 F.2d at 786. There was no meaningful failure by the states to object to personal jurisdiction, because there was no clue that jurisdiction over them had been asserted. Further, at the very least, the "special appearance" by the thirty-three states can only be construed to mean that the states objected to any attempt by the District Court to assert jurisdiction over them. Thus, the first requirment under *Cactus Pipe* to find personal jurisdiction was never met.

Secondly, the brief filed in the District Court by the thirty-three attorneys general asked that the respondents' motion for temporary restraining order against Texas be denied, or that the hearing time be extended, and not that any particularized, substantive relief be given in their favor. The Circuit Court noted that the airlines' motion sought injunctive relief only against Texas. *Id.* at 786.

Thus, under the facts presented as applied to the test in *Cactus Pipe*, the second condition to find personal jurisdiction is absent as well. Thus, the District Court ignored the clear requirements of controlling circuit precedent set out in *Cactus Pipe* and found jurisdiction.

The point, of course, is not that the Fifth Circuit has been disingenuous in its interpretation of its caselaw. It can interpret its precedent however it pleases, within the bounds of the Constitution. The point is that here, the thirty-three states came to the Western District of Texas without a clue that controlling circuit precedent would be radically interpreted and applied to them retroactively. The District Court, in effect, snared thirty-three states into litigation where the states had no opportunity to comment on the propriety of their joinder, and no opportunity to opt out. Surely, this is a deprivation of due process. *Cf., Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 679 (1930).

Congress has devised the means by which states may intervene in federal litigation where the constitutionality of state law "is drawn into question". That procedure is set out in 28 U.S.C. § 2403(b), and it requires that the federal court certify the constitutional question to the state attorney general, and afford the state an opportunity to intervene. Here, the district court acted illegally in ignoring the requirements of 28 U.S.C. § 2403(b).

In addition, the Circuit Court read Rule 24, F.R.Civ.P. out of existence. That rule allows intervention both as a matter of right and with permission of the court. In either situation, a timely motion must be made indicating the basis upon which intervention is being requested.

F.R.Civ.P. 24(c) requires that the motion be filed with the court and served upon the parties. Under this procedure, the intervenor and the other parties have notice of the motion and an opportunity to comment.

Thus, the lower courts completely ignored the provisions of 28 U.S.C. § 2403(b) and F.R.Civ.P. 24 and the due process protections inherent in them. There was no certification of the constitutional question, no motion filed stating the grounds for intervention and no supporting documentation. In fact, the parties were only informed of their "intervention" after the court had ruled on the injunction motion. This made it impossible for the thirty-three states to contest the *"de facto"* intervention, the finding of jurisdiction and the injunction to which they were now subject. Clearly the lower court failed to satisfy this Court's standard for personal jurisdiction by inventing and applying a "novel" jurisdictional device, "de facto intervention", that does great violence to traditional notions of fair play and substantial justice.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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